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IN THE

Supreme Court of the United States

October Term, 1947

No.....

ATLANTIC STATES MOTOR LINES, INCORPORATED,

Petitioner

v.

COMMONWEALTH OF VIRGINIA
At the Relation of
STATE CORPORATION COMMISSION,

Respondent

Petition for Writ of Certiorari to the Supreme Court of Appeals of Virginia

---

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary Statement of Matters Involved

I.

This is an action to annul and set aside a final order and judgment and penalty assessed by the Corporation Commission of Virginia against petitioner, a North Carolina corporation, exclusively engaged in interstate commerce, wherein petitioner has been ordered to pay a certain tax of $6,510.40

and a penalty of $325.00, which tax is presumed to represent the sum of 5¢ per gallon on motor fuel, or gasoline, alleged to have been used in Virginia but not purchased in Virginia, and for a declaratory judgment holding that petitioner is not liable to pay such tax and penalty.

The respondent purported to act under the provisions of Chapter 108 of the Acts of the General Assembly of Virginia of 1942, printed as an Appendix to this petition. (See Appendix)

This Act in substance provides that motor carriers operating in Virginia for compensation shall purchase in Virginia motor fuel in amount equal *to that used in Virginia,* or in lieu of such purchase pay an amount of money equal to the Virginia gas tax on this amount of gasoline. The Virginia gas tax is an excise tax of 5¢ per gallon (now 6¢) imposed on the sale of gasoline, as provided by Chapter 212 of the Acts of 1932, which Act is a general law of the State entirely apart from Chapter 108 of the Acts of 1942.

In the administration of Chapter 108 of the Acts of 1942, and to determine the amount of motor fuel *used* by a motor carrier while operating *in Virginia,* the Virginia Corporation Commission devised a formula (R. p. 30) whereby it is automatically assumed that a motor carrier uses in Virginia that percentage of its total motor fuel purchased as the miles traveled by it in Virginia is of the total miles operated throughout its system. If 20% of its total mileage was traveled in Virginia, it is arbitrarily assumed that it used in Virginia 20% of all of the motor fuel used in its entire operation both in Virginia and in other States.

Petitioner reported on forms prescribed by the Virginia Corporation Commission giving its total mileage; its Virginia mileage; the amount of motor fuel purchased in Virginia; and the amount of motor fuel purchased for its entire operation.

Pursuant to its formula (not provided for by statute—see Appendix) the Virginia Commission found (R. p. 49) that petitioner was deficient in its Virginia purchases of motor fuel, that it had not paid to Virginia a sum of money equal to the Virginia gas tax on such deficiency, and thereupon entered judgment for said amount of $6,510.40, and in addition assessed a penalty of $325.00.

From this judgment of the Virginia State Corporation Commission petitioner appealed to the Supreme Court of Appeals of Virginia, which Court sustained the judgment of the Commission.

In its opinion (R. p. 66) the Supreme Court of Appeals of Virginia held that the Act imposed a valid use tax. The Court did not assert the right on the part of the State of Virginia to compel an interstate motor carrier to purchase motor fuel in Virginia.

In the Court below petitioner contended that the statute as applied by the State Corporation Commission, through use of a system formula (R. p. 4), imposed an unreasonable burden upon interstate commerce, deprived petitioner of property without due process of law, that the Act on its face was unconstitutional as a regulation of interstate commerce, and that the provision therein permitting petitioner, in lieu of purchase, to pay the regular State gasoline tax assessed under another statute was in effect merely a penalty imposed for the failure to purchase gasoline in Virginia.

The Court below held:

> "The plain and simple purpose of the Act was to levy a use tax of 5¢ per gallon of gasoline upon all motor vehicle carriers for hire operating over the highways of Virginia." (R. p. 66)

Petitioner contended below (R. p. 3) "the statute discriminates against interstate commerce and is an unreasonable burden upon the same."

The Court below held:

> "A complete answer to this contention is that intrastate carriers purchase their gasoline from local dealers and pay the tax to such dealers." (R. p. 67)

This petition is to seek a review of the decision by the Supreme Court of Appeals of Virginia.

II.
Opinion of the Court Below

The opinion of the Supreme Court of Appeals of Virginia is reported in 186 Va. 596, 43 S.E. 2nd 868.

III.
Statement of Jurisdiction

This Court has jurisdiction to grant this petition for certiorari and to hear this appeal by virtue of the provisions of 28 U. S. C. A. 344 (Judicial Code, Section 237), which authorizes this Court, upon petition of a litigant, to cause a case to be certified to it from the highest Court in a State.

The judgment of the Supreme Court of Appeals of Virginia sought to be reviewed was entered on September 3, 1947, and this petition is being filed in the office of the Clerk of this Court within three months of the entry of said judgment, as provided for in 28 U. S. C. A. 350.

IV.
The Questions Presented

There are three questions which petitioner desires to present to this Court if certiorari is granted:

1. The statute is, on its face, unconstitutional under the "Commerce Clause" of the Constitution of the United States

in that it directly and substantially regulates the sale, purchase and use of gasoline in interstate commerce and deprives petitioner of its constitutional right to purchase gasoline in a free market.

2. The determination of petitioner's tax liability through the arbitrary use of an administrative formula is on its face unconstitutional in that the State fails to show the actual amount of motor fuel used in Virginia, rendering it impossible to say that the charge made is the proper measure of compensation for the use of Virginia highways, and is an unreasonable burden on interstate commerce.

3. The Act, as applied, substantially discriminates against interstate commerce and constitutes an unreasonable burden upon the same.

V.

Reasons Relied on for the Allowance of the Writ

1. The question here is raised whether a State has the authority to require an interstate motor carrier to purchase a certain commodity (in this case gasoline) within its borders so that incidentally the State, by reason of such purchase, may collect an excise tax imposed upon the sales of such commodity under another and general State law. The Act assailed reads in part (see Appendix):

> "Every motor carrier operating in this State . . . shall purchase, within this State, gasoline or other motor fuel . . ."

2. Viewing the Act in light of the construction placed upon it by the lower Court as being a statute merely imposing a use tax, the question then arises whether the State, through the use of the formula devised by the Corporation Commission, has assessed the correct amount of tax.

The statute in terms provides that the amount of such tax shall be equivalent to 5¢ per gallon on the amount of motor fuel used by a carrier while operating in Virginia. In order to correctly ascertain the amount of tax due it is necessary to determine first the amount of motor fuel *used* in Virginia. This the State has been unable to do. The testimony of Mr. A. S. Boatwright, auditor for the Virginia State Corporation Commission, is explicit on this point (R. p. 35):

"Q. Do you make any inquiry, Mr. Boatwright, or do you obtain any information relative to the amount of motor fuel which the carrier actually consumes in Virginia?

A. I don't know of any source whatsoever where that information could be obtained. I might just as well to try to measure the sands of the sea."

Again the witness said (R. p. 31):

"Q. You mean to say, Mr. Boatwright, that the amount you have named was the amount of motor fuel actually consumed in the vehicles of this Company during this quarter?

A. No, I would not say that.

CHAIRMAN DOWNS: What is it?

A. I know of no way, or never heard of anybody that can determine that."

To supply this deficiency the State Corporation Commission devised an arbitrary administrative formula under which it has attempted to approximate the amount of gasoline used (R. p. 34) and accepted such approximation as a definite fact.

"A. The formula automatically makes that a fact that he has done that, relatively speaking."

Under this system of approximation it is not possible to determine whether the charge made is a proper measure of the use of the State's roads for the reason that the amount of such use is undeterminable. The State is unable to say, therefore, that the charge made, as expressed by this tax, bears a proper and true relation to the use of its roads.

3. The question is also raised in this case, upon which petitioner strongly relies, whether the Act, *in its practical operation,* considered as construed by the lower Court as imposing a use tax, *discriminates against interstate commerce,* is an unreasonable burden upon the same, and in fact is a charge made for the privilege of operating in interstate commerce by motor vehicle through Virginia.

The Act under attack here (see Appendix) was also the subject of consideration in the recent case of Mason and Dixon Lines, Inc., v. Commonwealth of Virginia, decided by the Supreme Court of Appeals of Virginia January 13, 1947, 185 Va. 877, 41 S.E. 2nd 16, and writ of certiorari denied by this Court April 14, 1947.

In the *Mason and Dixon case, supra,* the discriminatory feature of the Act was not developed, as in this case, by the evidence, and the lower Court brushed this point aside and in substance said that since the Act by its phrasing applied to all carriers operating for compensation, the Act was not discriminatory. *No consideration was given at all to the practical operation of the Act.*

Also in the *Mason and Dixon case, supra,* as in this case, the lower Court had little or nothing to say with respect to the State's authority to compel purchases to be made within its borders but was content to hold that the Act, taking it altogether, imposed a use tax, which constituted a compensatory charge for the use of the State's highways.

In this case petitioner's chief contention before the lower Court was that the Act, as so construed, and in its practical operation, discriminated against interstate commerce in favor of intrastate business. That as a matter of fact it did not apply to intrastate operators at all, and that the assessment made thereunder against this petitioner was in reality a charge for the privilege of engaging in interstate commerce through Virginia.

> "The Commerce Clause forbids discrimination, whether forthright or ingenius. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best and Co.* v. *Maxwell,* 311 U. S. 454, 85 Law Ed. 275-277.

Petitioner's contention that the Act in its practical operation in no way touched upon or affected Virginia intrastate operations was fully sustained by the evidence. Mr. A. S. Boatwright, auditor for the Virginia State Corporation Commission, who testified on behalf of the State, testified as follows (R. p. 28-29):

> "Q. Have carriers who operate entirely in the State of Virginia been required to fill out those reports?
>
> A. The Act is enforced against all motor vehicle carriers operating for compensation, whether contract, common carrier or for hire carriers, of which the Commission has knowledge. Where it is found that a carrier is operating exclusively in Virginia, reports are not required since such carriers purchase their gasoline in this State.
>
> Q. Then the answer to my question is that intrastate carriers are not required to fill out these reports?

A. It has been found that very few carriers who operate only one truck whose operation extends to beyond the State line, purchases an appreciable amount of motor fuel outside of the State, and therefore, reports from such carriers have not been insistd upon, although when it has been ascertained that such carrier is not complying with the Act steps are taken to enforce such a compliance. It is believed that enforcement of the Act is at least 90% effective.

Q. Insofar as you know, has any Virginia intrastate carrier ever filed a report responsive to Chapter 108 of the Acts of 1942?

A. Quite a number of them do until we investigate the situation either by some correspondence or a personal visit and then notify them that, so long as they operate solely intrastate, we will not require them to file the report, but we put them on strict notice, that in the event they start to operate in interstate commerce, they would have to file this report and the burden was on them to notify us if and when they began such operation.

Q. The Act, therefore, in its administration and enforcement in no way affects any carrier other than those who operate in interstate commerce?

A. The practical application of the Act I would say yes."

In answer to the first question quoted above the witness at first in effect referred to the wording of the statute.

In answer to the second question above quoted the witness referred to *interstate carriers* operating only one truck. Apparently revenue derived from so small an interstate carrier would not warrant the expense of checking and filing reports. In next to the last paragraph of the opinion of the lower Court (R. p. 67), a part of this answer was quoted,

but as pointed out the witness was referring to one truck *interstate* carriers and not to Virginia intrastate carriers at all.

Finally the witness made a definite reply to the questions propounded, as set forth in the answer to the last question above quoted.

We wish to emphasize reply of witness to the third question above quoted:

> ". . . but we put them on strict notice, that in the event they start to operate in interstate commerce, they would have to file this report . . ". (R. p. 28-29)

Thus it is established that the tax in question is but a charge laid for the privilege of operating in interstate commerce through Virginia.

Virginia intrastate carriers, even when operating into border cities where a large portion of their motor fuel could easily be purchased over the State line, are not even required to file reports.

Again it is said by Mr. Boatwright (R. p. 30):

> "Q. And I believe you stated that this Act in no way affects Virginia intrastate commerce?
>
> A. Yes, sir.
>
> Q. And I believe you stated that this Act in no way affects Virginia intrastate commerce as a practical proposition?
>
> A. Not this Company because they do no intrastate business.
>
> Q. That Act does not in its administration or enforcement in no way affect intrastate commerce?
>
> A. Yes, it does where the carrier does both intrastate and interstate business and his operations are co-mingled and there is no way of segregating them.

Q. But my question was that it did not apply on those operating in intrastate commerce in Virginia?
A. We don't apply it against them but the language of the Act says it applies to both."

It being established by testimony of a responsible State official, that the Act affects only those engaged in interstate commerce and assessments thereunder being in fact a charge for the privilege of engaging in interstate commerce, it remains only to be seen whether such discrimination constitutes a substantial and unreasonable burden upon those engaged in such commerce.

The cost of gasoline or other motor fuel, plus State and Federal tax (which taxes are included in the cost price), constitutes one of the chief items of the motor carrier's operational costs. This item of cost perhaps is only secondary to labor costs. To, in effect, compel the interstate carrier to pay the excise tax of *two* States upon a substantial portion of its motor fuel is upon its face unreasonable, and imposes upon the interstate carrier a heavy additional operational cost as compared to the Virginia intrastate carrier.

The State's auditor testified on this point (R. p. 30):

"Q. Assuming that the motor fuel tax of North Caroline is five cents, or equal to that in Virginia, would not the effect of that be, if this is carried to a conclusion against that company, that on this particular gas or motor fuel, this Company would have paid a motor fuel tax in two states, or a total motor fuel tax of ten cents per gallon?
A. That follows as a natural consequence of the assumption."

Further evidence shows (R. pp. 46-47 and R. p. 21) that it is sought to discriminate against this petitioner by

demanding that the excise tax of two States be paid on 130,207.9 gallons of motor fuel. In terms of money, the amount of discrimination is $6,510.40.

The lower Court on the subject of discrimination had this to say in its opinion: (R. p. 66)

> "Appellant attempts in vain to make a distinction between the two cases. In its brief, this is said: 'Under the decision of this Court in the Mason and Dixon case the statute in effect has been stripped of the provision whereby interstate carriers are required to purchase motor fuel in this State, and remains merely a law whereby there is a use tax imposed upon interstate carriers equivalent to the amount of 5¢ per gallon upon each gallon of motor fuel consumed in their Virginia operations. The question, therefore, boils itself down to the inquiry of whether such use tax (1) is paid by intrastate carriers, and (2) whether if it be paid by interstate carriers alone, it constitutes a substantial discrimination in favor of intrastate business?'
>
> The plain and simple purpose of the act was to levy a use tax of five cents per gallon of gasoline upon all motor vehicle carriers for hire operating over the highways of Virginia."

The lower Court further in answer to petitioner's charge of discrimination says: (R. p. 67)

> "A complete answer to this contention is that intrastate carriers purchase their gasoline from local dealers and pay the tax to such dealers. Motor carriers for hire, whether doing an intra- or interstate business, have the election to purchase gasoline in Virginia and use the same on her highways, or to buy the gasoline elsewhere and pay the use tax on so much of it as is used to operate its motor vehicles over the highways of the State. No carrier is required to do both, but each must pay the tax in one or the other of the two methods set forth in the statute."

The lower Court has held the Act to be non-discriminatory upon the assumption that intrastate carriers purchase in Virginia all of the gasoline which they use, and that this fact places both intrastate and interstate carriers upon the same footing. The lower Court, however, in arriving at this conclusion disregards the fact that intrastate carriers operating in the border cities are not required under the Act to file reports showing that *they actually do purchase* all of their gasoline in Virginia and, moreover, the lower Court disregards entirely the fact that the interstate carrier is within its constitutional right when it purchases in some other State the motor fuel it uses while operating through Virginia.

The question is whether the comparable operating costs of interstate carriers have been unreasonably increased through the practical operation of this Act beyond that of the carrier engaged only in Virginia intrastate business. That it has been so increased is obvious. For example: an intrastate carrier operating Virginia mileage sufficient to consume 1,000 gallons of gasoline pays the cost of this gasoline plus Federal tax and one State excise tax. An interstate carrier with equal Virginia operation, for which gasoline is purchased in some State other than Virginia, in turn pays Federal tax and the excise tax of the State where the purchase is made. At this point the two carriers are upon equal footing. Each has paid a Federal tax and *one* State's excise tax. When, however, the State of Virginia then requires the interstate carrier to incur additional operational cost equivalent in amount to the Virginia excise tax on this amount of gasoline, it discriminates against interstate commerce to that extent. The interstate carrier pays the excise tax of *two* States.

In order for the above not to constitute discrimination, it must be held that a State has the right to compel the pur-

chase of gasoline within its borders. Unless the State has the right to compel purchases to be made where its excise tax will apply, it necessarily follows the State cannot impose some other tax in lieu of such purchases without discriminating against interstate commerce.

To this the lower Court has said:

> "A complete answer to this contention is that intrastate carriers purchase their gasoline from local dealers and pay the tax to such dealers." (R. p. 67)

The point is, however, that when intrastate carriers "purchase their gasoline from local dealers and pay the tax to such dealers" *they pay a Virginia excise tax on the sale of gasoline levied under the provisions of the Virginia Motor Fuel Tax Act, and do not pay a tax assessed under Chapter 108 of the Acts of 1942.*

The Virginia intrastate carrier when purchasing motor fuel in Virginia does not pay a tax assessed by this Act but pays the Virginia excise tax on the sale of gasoline as provided for in the State's general motor fuel tax law.

Again the lower Court (R. p. 67) in pointing out that the Act was not discriminatory quoted testimony of Mr. Boatwright, where he said:

> "He also said: 'When it has been ascertained that such carrier is not complying with the Act steps are taken to enforce such compliance.' "

As hereinbefore pointed out, the witness Boatwright, when making this statement (R. p. 28) was referring only to *interstate* one truck carriers.

The witness (R. pp. 28-29) to the very next question replied:

> ". . . so long as they operate solely intrastate, we will not require them to file the report, but we put them on strict notice, that in the event *they start to operate in interstate commerce,* they would have to file this report and the burden was on them to notify us if and when they began such operation." (Italics supplied)

In this case, the State Corporation Commission (R. p. 52) disregarded the evidence establishing actual discrimination against interstate commerce and adopted for its opinion the opinion which it had written in the case of *Mason and Dixon Lines, Inc.* v. *Commonwealth of Virginia, supra.* There was no discussion by it of the facts established in this case.

Likewise, in the opinion of the Supreme Court of Appeals of Virginia little consideration is apparently given the evidence, the case being disposed of with a final reference to the former case. (R. p. 67)

The evidence in this case consists of the testimony (and exhibits filed therewith) of a State official familiar with the practical operation of the Act. This testimony establishes that in its practical operation the Act discriminates against interstate commerce to the extent of compelling interstate motor carriers operating through Virginia to pay the excise tax of two States upon a substantial amount of motor fuel. The law is well settled that if a State Act discriminates against interstate commerce, it is contrary to the Commerce Clause of the Constitution of the United States.

As said in concurring opinion in the case of *McCarroll* v. *Dixie Greyhound Lines,* 309 U. S. 176, 84 Law Ed. 683, 688:

> "There are ways enough in which the state can take its lawful toll without any suppression of the commerce which it taxes."

It is further said in *Best and Co.* v. *Maxwell,* 311 U. S. 454, 85 Law Ed. 275, 277:

> "The freedom of commerce which allows the merchants of each State a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language."

Also in the leading Virginia case on the subject, *American Air Lines* v. *Battle,* 181 Va. 1, 23 S.E. 2nd 796, 802, the Court said:

> "Every tax is, to some extent, a burden upon the subject to which it affixes itself. The test is not whether it is a burden, but whether it is discriminatory or regulatory."

The Virginia Court in this case, quoting *Dunston* v. *City of Norfolk,* 177 Va. 689, 15 S.E. 2nd 88, continued:

> "Under the principles at present applied, the test of the validity of a State taxing law is whether it may, in its practical operation, be made an instrument for impeding or destroying interstate commerce or placing it at a disadvantage in competition with intrastate business." See also Clark v. Poor, 274 U. S. 554, 71 Law Ed. 1199; Interstate Transit v. Lindsey, 283 U. S. 183, 75 Law Ed. 953, 964, 967.

In the case of *Southern Pacific Company* v. *Arizona,* 325 U. S. 761, 89 Law Ed. 1915, 1924, it is said:

> ". . . this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests."

In this case the Court further said:

> "But ever since Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 Law Ed. 23, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state . . ."

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Appeals of Virginia commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, the transcript of the record and proceedings herein; and that the decree of the Supreme Court of Appeals of Virginia be reversed by this Honorable Court and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

ATLANTIC STATES MOTOR LINES, Incorporated
Petitioner

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(App., p. 1)

APPENDIX

Acts of Assembly 1942

CHAP. 108.—AN ACT to require certain motor carriers to purchase certain motor fuel in Virginia or, in lieu thereof, to make certain payments into the State treasury; to require certain reports to be made by such carriers; to provide for the administration of this act by the State Corporation Commission, to prescribe remedies for the enforcement of this act and penalties for violations; and to repeal Chapter 198 of the Acts of the General Assembly of 1940, approved March 13, 1940. [H B 124]

Approved March 6, 1942

1. Be it enacted by the General Assembly of Virginia, as follows:

Section 1. Every motor carrier operating in this State and over the highways of this State, including the streets and alleys in the cities and towns thereof, for compensation, whether engaged in intrastate or interstate commerce or both, and whether or not by virtue of any certificate or permit issued by the State Corporation Commission, shall purchase, within the State, gasoline, or other motor fuel, at least equal to that amount necessary for use in the operation as a motor carrier within the State, or such motor carrier shall, in lieu of making such purchase, pay into the treasury, for credit to the State Highway Fund, an amount equivalent to the prevailing State tax on the amount of gasoline, or other motor fuel, necessary for its operation as a motor carrier within this State over and above the amount of tax paid on gasoline, or other motor fuel actually purchased in the State.

Section 2. Every such motor carrier shall file with the State Corporation Commission (hereinafter called "the Commission") periodic reports, at such times, but not less than quarterly, and on such forms, as shall be prescribed or permitted by the Commission, showing the mileage traveled and the gasoline, or other motor fuel, purchased within

the State and the amount, if any, paid into the treasury in lieu of purchase of gasoline, or other motor fuel, as provided by this act.

Section 3. Upon the failure of any such motor carrier, as required by this act, to purchase gasoline, or other motor fuel, or to pay into the treasury an equivalent of any tax that would have been paid upon gasoline, or other motor fuel, necessary for such operation if such gasoline, or other motor fuel, had been purchased within the State, the Commission shall, by its order duly entered, after due notice to such carrier, opportunity to be heard, and full hearing, and upon the finding by the Commission that the carrier has not complied with the requirements of this act, enter judgment in an amount equal to the tax on the gasoline, or other motor fuel, which such carrier failed or refused to purchase for its operation in this State less any amount which has been paid into the treasury in lieu thereof, as provided by this act, and, in addition, shall impose a penalty not exceeding one thousand dollars, and the Commission may, in its discretion, also revoke or suspend any certificate or permit issued by the Commission and held by such motor carrier. Any amount imposed by the Commission on account of tax on gasoline, or other motor fuel, not paid indirectly or directly as required by this act, shall, upon collection, be covered into the treasury for credit to the State highway fund, and any penalty imposed, upon collection, shall be covered into the treasury for credit as provided by law in the case of other penalties. All amounts imposed by the Commission under the provisions of this act shall be collected by and under the process of the Commission.

Section 4. The Commission shall, after due notice, hearing, and opportunity to be heard, impose a penalty, not exceeding five hundred dollars, upon finding that any motor carrier, subject to the provisions of this act, has failed or refused to file any report with the Commission as required by this act, and every failure to file any such report shall

constitute a separate offense. The liability to penalty hereby provided for is cumulative with, and irrespective of, any other liability or penalty provided for by this act, or by any other law.

Section 5. The Commonwealth shall have the right to proceed in the Circuit Court of the City of Richmond to recover any amount due the State on account of the failure of any such motor carrier to comply with the requirements of this act, but such action on behalf of the Commonwealth shall not preclude a proceeding before the Commission for the imposition of a penalty not exceeding one thousand dollars as in this act provided. Any final judgment of the Circuit Court of the City of Richmond, not stayed or reversed, shall be conclusive in a proceeding before the Commission against the same carrier, growing out of the same facts, for the imposition of a penalty as in this act provided. In any case in which the Commission shall have entered a judgment on account of any failure to comply with the provisions of this act, or shall have dismissed the proceeding, after hearing on the merits, no proceeding shall thereafter be instituted, nor judgment entered, in the Circuit Court of the City of Richmond, against the same carrier on account of the same default or defaults.

2. Be it further enacted, That Chapter one hundred and ninety-eight of the Acts of the General Assembly of Virginia, nineteen hundred and forty, approved March thirteenth, nineteen hundred and forty is repealed.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 465

ATLANTIC STATES MOTOR LINES, INCORPORATED,
PETITIONER,

vs.

COMMONWEALTH OF VIRGINIA, at the Relation of the STATE CORPORATION COMMISSION,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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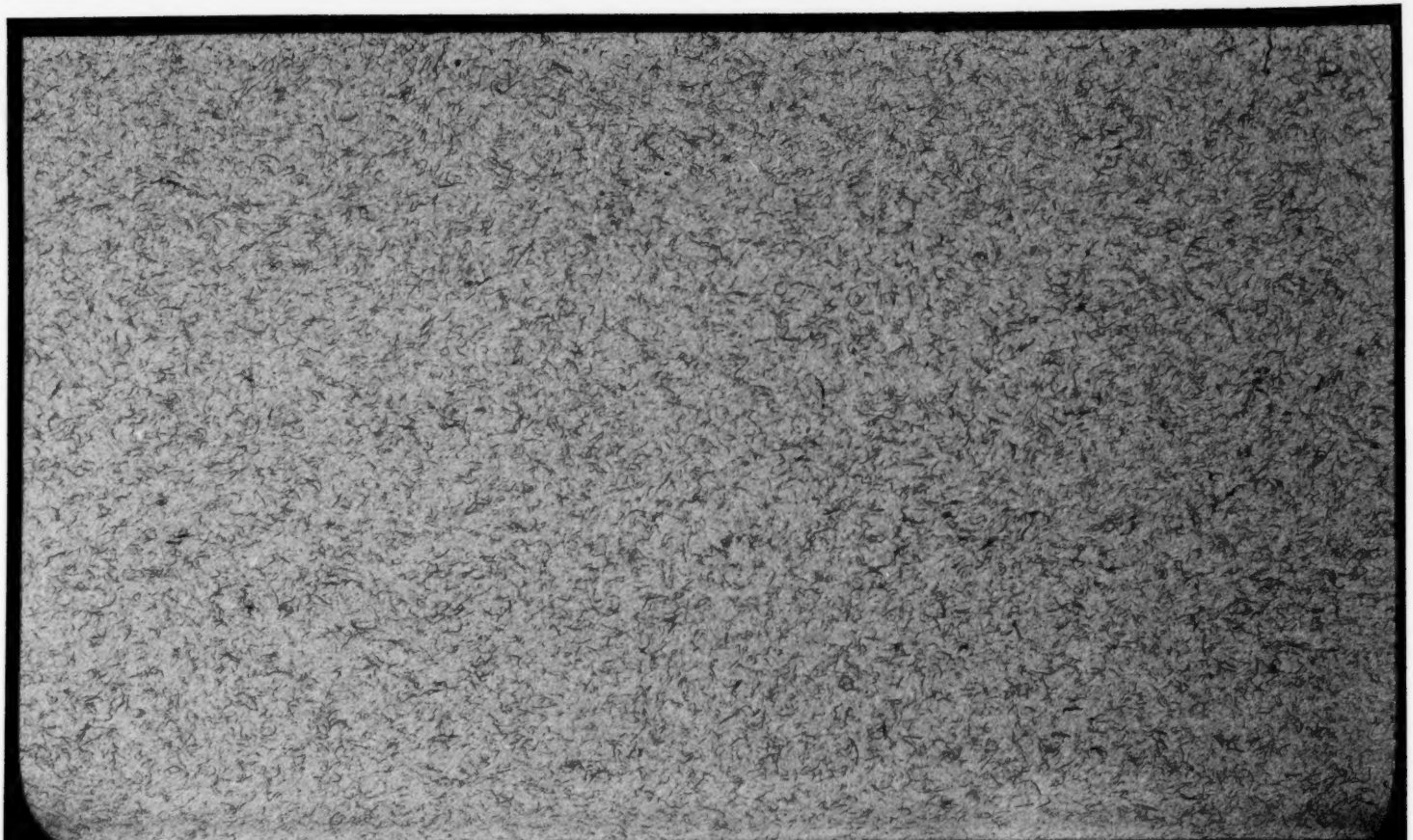

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 465

ATLANTIC STATES MOTOR LINES, INCORPORATED,
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RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

This brief is filed on behalf of respondent, Commonwealth of Virginia, at the relation of the State Corporation Commission, in opposition to the granting of the writ of *certiorari* prayed for in the petition, for the reason that the case presents no Federal question of substance decided by the court below not heretofore determined by this Court.

STATEMENT OF THE CASE

Petitioner is a North Carolina corporation and a motor carrier operating over the highways of the Commonwealth of Virginia. In proceedings before the State Corporation Commission of Virginia it was determined that for the period from July 1, 1944, through June 30, 1946, the petitioner failed to purchase in Virginia gasoline or other motor fuel necessary for its operations as a motor carrier within Virginia to the extent of 130,207.9 gallons, and that the petitioner failed to pay into the treasury of the State of Virginia as an alternative to such purchase an amount equivalent to the prevailing State tax on the said amount of 130,207.9 gallons of gasoline or motor fuel, which equivalent amount was $6,510.04. (R. pp. 50, 51).

Acting under the provisions of Chapter 108, Acts of Assembly of Virginia of 1942, the State Corporation Commission entered judgment against the petitioner whereby the petitioner was ordered to pay to the Commonwealth of Virginia the sum of $6,510.04 plus a penalty of $325 for its failure to comply with the provisions of said Act.

On Appeal by the petitioner to the Supreme Court of Appeals of Virginia the judgment of the State Corporation Commission was affirmed.

Before the State Corporation Commission and the Supreme Court of Appeals of Virginia the petitioner challenged the validity of Chapter 108 of the Acts of Assembly of Virginia of 1942 (printed as the Appendix to the Petition for Writ of Certiorari) as being in violation of the Commerce Clause of the Constitution of the

United States. It was contended that the Act required the purchase of motor fuel in Virginia and was an unlawful attempt to regulate interstate commerce. It was further contended that the statute discriminates against interstate commerce and that it violates the Commerce Clause of the Constitution of the United States in imposing a tax upon the privilege of using an instrumentality of interstate commerce.

The petitioner also contended that the evidence did not establish the amount of motor fuel necessary for use by the petitioner in its Virginia operations and challenged the method used to determine the quantity of motor fuel for such use.

OPINIONS BELOW

As will be seen from the opinion of the State Corporation Commission in this case (R. pp. 50-64) all relevant facts in this case were substantially the same as those in the case of *Commonwealth of Virginia, at the relation of the State Corporation Commission* v. *Mason and Dixon Lines, Incorporated* (Case No. 8376 before the State Corporation Commission) and substantially the same defenses were offered by the respective carriers in the two cases.

This case was decided by the State Corporation Commission a few months after the *Mason and Dixon Lines Case* and the earlier case was considered so identical and controlling that the Commission adopted its opinion in the former case as its opinion in this case. Both cases were appealed to the Supreme Court of Appeals of Virginia,

the appeal being a matter of right, and in the opinion of that court in this case it was also pointed out that its decision in the former case, *Mason and Dixon Lines, Inc.* v. *Commonwealth*, 185 Va. 877, 41 S. E. 2d. 16, was in all respects controlling, as it involved the same issues and were without any factual distinction. (R. pp. 65-67).

In these decisions of the State Corporation Commission of Virginia and of the Supreme Court of Appeals of Virginia it was held that the statute under consideration imposed upon *all* motor carriers operating for compensation over the highways of Virginia, either in interstate *or intrastate* commerce, a compensatory charge or tax for the use of such highways measured by the amount of motor fuel consumed in Virginia operations; that such could be paid, either by buying in Virginia and paying the regular motor fuel tax thereon the motor fuel necessary for operating in Virginia, or by paying directly into the State treasury an amount equivalent to the prevailing State tax on the amount of such fuel. It was held that, since the contribution exacted for the maintenance, construction and reconstruction of the highways provided by the State was proportionate to the use made of such highways, no unconstitutional burden was placed upon interstate commerce. (See opinion of Downs, Chairman of the Commission, R. pp. 50-64).

The Supreme Court of Appeals of Virginia sustained the conclusions of the State Corporation Commission and held that there was no discrimination as between interstate and intrastate commerce. It was further held that the finding of the Commission as to the amount of

motor fuel necessary for petitioner's Virginia operations was supported by competent evidence. (See opinion of Justice Hudgins, R. pp. 65-67).

A petition for writ of *certiorari* was presented to this Court in the first of these two cases, *Mason and Dixon Lines, Incorporated* v. *Commonwealth of Virginia, at the Relation of the State Corporation Commission* at the October term, 1946. (See Record No. 1117 of the October term, 1946, of this Court). In that petition exactly the same questions that are raised by the petition in the present case were presented. The petition for *certiorari* was denied by this Court on April 14, 1947. See ..... U. S. ....., 91 L. Ed. 983 (Advance Sheets No. 12). The issues presented in the present case have, therefore, previously been presented to this Court on petition for *certiorari*, which petition was denied. This brief in opposition to the granting of *certiorari* will, consequently, be largely the same as that filed in the *Mason and Dixon Lines Case.*

THE QUESTION PRESENTED

The petitioner states three questions which he desires to present to this Court if *certiorari* is granted. The only substantial question, however, is whether the statute imposes a valid compensatory charge for the use of Virginia highways by the petitioner and others operating as motor carriers for compensation in Virginia.

ARGUMENT

I.

The Statute Does Not Require The Purchase Of Motor Fuel In Virginia, But Merely Imposes a Compensatory Charge Upon Motor Carriers Using The Highways Of Virginia.

The petitioner contends that the question before this Court is whether the State of Virginia may constitutionally require the purchase of gasoline in Virginia. This flies squarely into the teeth of the statute and the construction placed upon the same by the State Corporation Commission and the State Supreme Court. The statute provides that every motor carrier operating over the highways of Virginia for compensation, whether in intrastate or interstate commerce or both, shall—

> "* * * purchase, within the State, gasoline or other motor fuel, at least equal to that amount necessary for use in the operation as a motor carrier within the State, or such motor carrier shall, in lieu of making such purchase, pay into the treasury, for credit to the State Highway Fund, an amount equivalent to the prevailing State tax on the amount of gasoline, or other motor fuel, necessary for its operation as a motor carrier within this State over and above the amount of tax paid on gasoline, or other motor fuel actually purchased in the State." (Acts of 1942, Chap. 108, Sec. 1)

There is no requirement whatsoever that any motor carrier purchase one drop of gasoline in Virginia. The statute provides for two equally applicable, alternative

methods, or a combination of both, by which motor carriers may pay the compensatory charge for the use of the highways of Virginia. The petitioner alleges that the statute demands one particular method and then quotes only a portion of the statute. As pointed out by the Chairman of the Commission in his opinion (R. p. 56), if the petitioner sees fit to purchase its motor fuel requirements elsewhere, it is free to do so, but, not wishing to purchase its Virginia requirements in the State, it must contribute its fair share toward the maintenance of the highways over which it travels.

Justice Hudgins, of the State Supreme Court, said in his opinion (R. p. 67):

> "* * * A complete answer to this contention is that intrastate carriers purchase their gasoline from local dealers and pay the tax to such dealers. Motor carriers for hire, whether doing an intra—or interstate business, have the election to purchase gasoline in Virginia and use the same on her highways, or to buy the gasoline elsewhere and pay the use tax on so much of it as is used to operate its motor vehicles over the highways of the State. No carrier is required to do both, but each must pay the tax in one or the other of the two methods set forth in the statute."

The Act imposes no unreasonable burden upon interstate commerce. If the petitioner, or any motor carrier, whether operating in interstate or intrastate commerce, finds that it can purchase motor fuel without the State on better terms than it can do so within the State, it is

free to do so. It is simply required to pay its fair share of maintaining the highways it uses in this State. The fact that it may pay a sales tax to the State in which it purchases the motor fuel is no reason it should be relieved of that obligation.

As was held by the courts below, the Act clearly imposes a compensatory charge which is not only measured by the *quantum* of use of the highways, but which is expressly dedicated to the construction and maintenance of such highways. If a motor carrier adopts the method of paying the charge by buying gasoline in Virginia and paying the regular gasoline tax on the motor fuel "necessary for use in the operation as a motor carrier in this State", the proceeds are dedicated to the maintenance and construction of highways by section 6 of Chapter 212 of the Acts of 1932, as amended by Chapter 206 of the Acts of 1942.* If the motor carrier adopts the method of paying directly into the State treasury an amount equivalent to the prevailing State tax on the amount of gasoline "necessary for its

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* "Section 6. Disposition of funds collected.—After providing for the refunds under this act, the director shall promptly pay all taxes and fees collected by him under this act into the State Treasury. The revenue derived from the tax levied as aforesaid is hereby appropriated for the construction of the roads and projects comprising the State primary highway system and for the construction or maintenance of the roads and projects comprising the State secondary highway system and shall be applied to no other purpose, except that there may be paid out of this fund as contribution towards the construction, reconstruction and/or maintenance of streets in cities and towns such sums as may be provided by law, and except further, that such sums out of said funds may be expended for the operation and maintenance of the highway department and the Division of Motor Vehicles as may be provided by law, provided, however, the Governor is hereby authorized to transfer out of the said gasoline tax an amount not exceeding twenty-five thousand ($25,000.00) dollars annually for the purpose of inspection of gasoline and motor grease measuring and/or distributing equipment, and/or for inspection and analysis of gasoline for purity; and there shall be paid out of this fund the amount appropriated to the Corporation Commission for the Division of Aeronautics."

operation as a motor carrier within this State", the proceeds are dedicated to that purpose by sections 1 and 3 of Chapter 108 of the Acts of 1942.

That such a compensatory charge for the use of public highways is valid cannot be seriously questioned. The authorities overwhelmingly support this view. The following from *Interstate Transit* v. *Lindsey*, 283 U. S. 183, 75 L. Ed. 953, 964-967:

> "While a state may not lay a tax on the privilege of engaging in interstate commerce * * * it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon * * *. As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use * * *, *or by the express allocation of the proceeds of the tax to highway purposes*, as in *Clark* v. *Poor*, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702, *supra*, or otherwise. *Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory.* * * *" (Italics supplied)

is directly applicable on principle to the instant case when the nature and disposition of the charge here involved are considered, and the record discloses not even a suggestion that the charge does not bear a "reasonable relation to the privilege of using the highways or (that it) is discriminatory."

The above principle has been adhered to time and again. Among the many cases may be mentioned *Hendrick* v. *Maryland*, 235 U. S. 610, 59 L. Ed. 385; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, 72 L. Ed. 551; *Clark* v. *Poor*, 274 U. S. 554, 71 L. Ed. 1199; *Ingels* v. *Morf*, 300 U. S. 290, 81 L. Ed. 653; *Dixie Ohio Express Co.* v. *State Revenue Commission*, 306 U. S. 72, 83 L. Ed. 495.

The petitioner does not deny that the charge imposed by the statute is compensatory. Nor is it contended that the imposition of such a charge violates the Commerce Clause of the Constitution of the United States. In view of the authorities sustaining such a charge the petitioner could not make such a contention with hope of success. He, therefore, contends for a construction of the statute not justified by its terms and which was rejected by both the State Corporation Commission and the Supreme Court of Appeals of Virginia. But the Virginia Supreme Court of Appeals has the final say in the interpretation of Virginia statutes and its construction will be accepted here. *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101, 104, 89 L. Ed. 101, 103. This Court, therefore, will not construe the statute differently in order to render it unconstitutional as advocated by the petitioner.

II.

The Petitioner's Attack Upon The "Formula" Used By The State Corporation Commission To Determine The Amount Of Motor Fuel Necessary For Petitioner's Virginia Operations Presents No Federal Question.

The statute fixes the base or measure of the compensatory charge as the gasoline "necessary for use" in Virginia operations. The petitioner was charged with not paying into the treasury of Virginia "an amount equivalent to the prevailing State tax on the amount of gasoline or other motor fuel necessary for its operation as a motor carrier within this State (Virginia) over and above the amount of tax paid on gasoline or other motor fuel actually purchased in the State." (R. p. 6)

The uncontradicted testimony of witness Boatwright is that the petitioner for the period from July 1, 1944, to June 30, 1946, failed by 130,207.9 gallons to purchase in Virginia gasoline necessary for use in its Virginia operations, and that it likewise failed to pay into the State treasury an amount equivalent to the prevailing State gasoline tax on this 130,207.9 gallons, which amounted to the sum of $6,510.40. See Record, page 20, where the following testimony appears:

> "Q. Mr. Boatwright, do I understand correctly from your audit and from the report of the Company which you have just explained and testified to with respect thereto, that the Company now is deficient in its purchases in the amount of 130,207.9 gallons, which amounts to

in dollars and cents $6,510.40?

"A. That is correct as of July 1st, 1946.

"Q. I ask you if the figures in your office reflect that any part of this $6,510.40 has been paid to the State of Virginia?

"A. The figures in our office do not show any payments against the amount.

"Q. Had any payment been made, would your figures indicate such a payment had been made?

"A. They would have."

The record shows that this testimony was based upon an audit of the petitioner's books for the period from July 1, 1944, to April 1, 1946, and from a report filed by the petitioner for the period from April 1, 1946, to June 30, 1946. The petitioner attacks this evidence because, in arriving at the amount of gasoline necessary for the petitioner's Virginia operations, the percentage of the carrier's entire operations (miles traveled) which took place in Virginia was applied to the total number of gallons of gasoline purchased for its entire operations. If the formula had not been reasonably accurate, petitioner could have presented evidence to substantiate its contention, but no such evidence was presented.

The question before the State Supreme Court was whether the evidence supported the finding as to the amount of gasoline necessary for the petitioner's Virginia operations. That court held that the finding was sustained by satisfactory evidence. (R. p. 67). The record presents no basis for a review of this question here

III.

The Statute Applies To Intrastate Carriers As Well As Interstate Carriers And In No Way Discriminates Against The Latter.

The statute expressly applies to intrastate carriers as well as interstate carriers. See the Appendix to the petition. The petitioner's charge that it is applied only to interstate carriers is utterly without foundation and is contrary, not only to its express terms, but to the decisions of the State Corporation Commission and the Supreme Court of Appeals of Virginia. If an intrastate carrier purchases without the State gasoline necessary for its operations within the State, it must pay an amount equivalent to the State tax on such gasoline, just as in the case of an interstate carrier.

We quote again from the opinion of the State Supreme Court:

> "The same attorney appeared for appellant and for the Mason and Dixon Lines, Inc. In the latter case, he contended that the statute was unconstitutional because it required interstate carriers to purchase gasoline used in Virginia from local dealers. This contention having been rejected, he now contends that the statute is unconstitutional because it has been construed to be a use tax and is not paid by intrastate carriers. A complete answer to this contention is that intrastate carriers purchase their gasoline from local dealers and pay the tax to such dealers. *Motor carriers for hire, whether doing an intra*

—or interstate business, have the election to purchase gasoline in Virginia and use the same on her highways, or to buy the gasoline elsewhere and pay the use tax on so much of it as is used to operate its motor vehicles over the highways of the State. No carrier is required to do both, but each must pay the tax in one or the other of the two methods set forth in the statute.

"Mr. A. S. Boatwright, the assistant tax assessor working under the supervision of the Corporation Commission charged with the enforcement of the provisions of this act, stated that 'the Act is enforced against all motor vehicle carriers operating for compensation, whether contract, common carrier or for hire carriers, of which the Commission has knowledge. Where it is found that a carrier is operating exclusively in Virginia, reports are not required since such carriers purchase their gasoline in this State.'

"He also said: 'When it has been ascertained that such carrier is not complying with the Act steps are taken to enforce such a compliance.'" (R. p. 67)

There is, therefore, no basis for the charge that the statute or its administration discriminates against interstate commerce.

CONCLUSION

For the reasons stated it is submitted that the petition-

er does not present a case wherein the court below decided a Federal question of substance contrary to the applicable decisions of this court, but on the contrary the only Federal question presented has been decided by the State court in line with the decisions of this Court and this question was previously presented to the Court in the petition for *certiorari* in the case of *Mason and Dixon Lines, Incorporated* v. *Commonwealth*, U. S. ....., 91 L. Ed. 983, which petition was denied. It is submitted, therefore, that the petition for a writ of *certiorari* in this case should be denied.

Respectfully submitted,

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